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No. 85-1129

In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA, THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION, THE STATES OF IDAHO, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW YORK, OREGON, WISCONSIN, AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF RESONDENTS

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INTEREST OF AMICI CURIAE

Amici respectfully submit this brief in support of respondents. Amici urge this Court to affirm the decision below and hold that a public employer may adopt a bona fide affirmative action plan to remedy a substantial underrepresentation of women in a traditionally segregated job classification without violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Amici have an interest both in preserving the right of public employers to take effective action to eliminate the impact of past discrimination on their work forces and in ensuring that federal and state laws forbidding employment discrimination are effectively enforced. Many of amici have themselves initiated voluntary affirmative action programs to eliminate discrimination and to remedy the effects of past discrimination.[1] All of Amici are responsible for enforcing state anti-discrimination statutes and thus have an interest in encouraging voluntary compliance as the primary means of ending discrimination violative of those statutes. Amici have a strong interest in preserving the authority to devise workable procedures to implement bona fide affirmative action plans, to end discrimination, to correct the underrepresentation of women and minority group members caused by past

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1. *See, e.g., Kirkland v. New York State Civil Service Commission*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *see also La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275 (9th Cir. 1982), approving a voluntary affirmative action program designed to end sex-based discrimination in hiring for the California Highway Patrol; *Local 526-M Michigan Corrections Organization, etc. v. State of Michigan*, 110 Mich. App. 546, 313 N.W.2d 143 (1981), rejecting a constitutional challenge to an affirmative action plan; and *United Building and Construction Trades Council v. Camden*, 88 N.J. 317, 443 A.2d 148 (1982), affirming state treasurer's approval of minority hiring goals.

discrimination, and to foster other governmental objectives.

The State of California and the California Fair Employment and Housing Commission, by John K. Van de Kamp, Attorney General of the State of California, and other Amici States by their Attorneys General, submit this brief pursuant to Supreme Court Rule 36.4. Amicus Pennsylvania Human Relations Commission files this brief with the consent of the parties pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

Bona fide affirmative action plans containing sex and race-based hiring or promotional goals are lawful means for public and private employers to remedy and eliminate the effects of past unlawful discrimination. They also serve to foster important public interests, e.g., establishing a racially integrated police force in a city with a recent history of racial unrest. *See Baker v. City of Detroit,* 483 F.Supp. 919, 996-1000, *aff'd sub nom., Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), mod. 712 F.2d 222 (1983), *cert. denied,* 464 U.S. 1040, *reh. denied,* 465 U.S. 1074 (1984). Amici argue that a public agency may take sex into consideration in making a promotional decision pursuant to a voluntary affirmative action plan adopted to remedy a substantial underrepresentation of women in a traditionally sex-segregated job.

One of the major goals of Congress in enacting Title VII in 1964 and amending it in 1972 to apply to public employers, was to provide an effective means of remedying discriminatory practices. This Court has unequivocally stated that a private employer may adopt race-conscious affirmative remedies to eliminate the effects

of past discrimination in traditionally segregated job classifications and may voluntarily adopt a race-conscious affirmative action plan. *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193 (1979). *Weber* applies with equal force to sex-based affirmative action by a public employer.

Once the Court confirms that voluntary affirmative action by a *public* employer is lawful under Title VII and under the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution, the issues herein are what circumstances justify race or sex-conscious measures and what are the limits of a lawful affirmative action plan.

An affirmative action plan may be premised on significant underrepresentation of a protected class under Title VII in a traditionally segregated job classification—precisely the factual predicate for the employer's sex-based employment decision in this case. Such a showing can be based solely on evidence sufficient to establish a prima facie case of unlawful employment discrimination under Title VII pursuant to either the disparate treatment or the disparate impact theory. Adoption of such a justification will serve the important policies of protecting those who are disadvantaged by affirmative action programs and at the same time permitting public employers to adopt programs without admitting discrimination, and thus exposing themselves to potential liability.

Public employers need clear guidelines as to how to design voluntary affirmative action plans which are lawful under Title VII and the Constitution. Using the plan approved by the Court in *Weber* as a starting point, this Court should hold that a public employer affirmative action plan is lawful if: 1) it results or is designed to

result in hiring sufficient numbers of minority group or female applicants so that the employer's work force approximates the balance that would have been achieved absent past discrimination; 2) continues only so long as is necessary to achieve its legitimate goals; 3) does not result in hiring unqualified applicants; and 4) does not completely bar white or male applicants or unnecessarily infringe their interests.

ARGUMENT

I. TITLE VII PERMITS PUBLIC EMPLOYERS TO ADOPT AFFIRMATIVE ACTION PLANS TO REMEDY THE EFFECTS OF PAST DISCRIMINATION.

A. Voluntary Action by Employers is the Preferred Means of Achieving the Goals of Title VII.

This Court has repeatedly held that Congress intended that voluntary action by employers be the preferred means of achieving the objectives of Title VII. *Local Number 93, International Association of Firefighters, AFL-CIO-CLC v. City of Cleveland,* 106 S.Ct. 3063 (1986); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-418 (1975); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). Consistent with this principle, this Court has approved an affirmative action plan adopted voluntarily by a private employer and union which reserved fifty percent of the openings in a craft-training program for black employees. *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193 (1979).

In *Weber,* this Court concluded, based on the legislative history, that voluntary affirmative action plans were not prohibited by Title VII because they were consistent with the remedial purposes of the Act:

> "Accordingly, it was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.
>
> "It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem." *Steelworkers v. Weber*, 443 U.S. at 203.

Accordingly, this Court held that Title VII permits private employers and unions to adopt reasonable race-conscious affirmative action plans.

The rationale of this Court's decision in *Steelworkers v. Weber* should apply with equal force both to voluntary affirmative action by public employers and to affirmative action intended to remedy sex-based discrimination.

B. Public Employers May Engage in Voluntary Affirmative Action.

With respect to public employers, this Court has not squarely addressed the legality of an affirmative action plan adopted voluntarily in furtherance of the purposes of Title VII.[2] However, the Court in *Firefighters v.*

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2. This Court's decision in *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986) addressed the issue of public employer voluntary affirmative action in a factual setting which did not require consideration of what Title VII permits. In *Wygant*, the Court disapproved a collective bargaining agreement term which provided that if the school district laid off teachers the percentage of minority teachers must remain the same as existed before the layoffs. The effect was that less senior minority teachers were retained while more senior white teachers were laid off. The stated purpose of the preferential

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Cleveland decided a closely related issue; it held that a public employer may take voluntary action in the form of a consent decree which includes reasonable race-conscious relief that benefits individuals who are not actual victims of the employer's prior discrimination.[3] The Court noted, in dicta, that in some circumstances public employers may lawfully engage in the type of affirmative action approved in *Weber:*

> "In any event there may be instances in which a public employer, consistent with both the Fourteenth Amendment as interpreted in *Wygant* and § 703 as interpreted in *Weber*, could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose." *Firefighters v. Cleveland*, at 106 S.Ct. at 3073, n. 8.

Congress has recognized and acted to remedy the particular problem of discrimination by public sector employers. In 1972, Congress amended Title VII to extend

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layoff provision was to retain sufficient minority teachers to serve as role models for minority students. In a plurality opinion, this Court held that the layoff plan was based on an irrelevant comparison between the percentage of minority teachers and the percentage of minority students in the district and that it was not adopted to remedy past discrimination in employment.

Applying the strict scrutiny test, the Court concluded that the plan was not narrowly tailored to achieve a compelling governmental interest because it imposed too great a burden on innocent non-minority employees. The Court cited its prior opinion in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) in support of its conclusion that layoffs based on race impose a heavier burden than race-based hiring goals.

3. The Court expressly noted that its decision was a narrow one limited to the question of whether § 706(g) of Title VII precluded the District Court from entering the challenged consent decree. *Firefighters v. Cleveland*, 106 S.Ct. 3063 (1986). The Court also noted that it did not "address the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 would nonetheless be barred by the Fourteenth Amendment." 106 S.Ct. at 3073, n. 8.

its prohibitions of unlawful discrimination to state and local governments and agencies. Equal Employment Opportunity Act of 1972, Pub. Law 92-261 (1972). In its report on the proposed amendment, the House of Representatives focused on the pervasiveness of employment discrimination practiced by public agencies:

> "In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country—North as well as South. The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices. The report cites widespread perpetuation of past discriminatory practices through de facto segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector." H. Rep. No. 92-238, reprinted in 1972 U.S. Code Cong. and Admin. News, 2137 at 2152.

Given the pervasiveness of discrimination by public employers, voluntary compliance as a means of resolving discrimination complaints takes on added significance. As Congress stated in enacting the 1972 amendments:

> "Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 92-415 at 10. 92d Cong., 1st Sess. (1971).

In addition to their compelling interest in eliminating discrimination from their own work forces, public agencies

also have a compelling interest in setting an example for private employers by acting voluntarily to comply with the law. *Wygant v. Jackson Board of Education,* 106 S.Ct. 1842, O'Connor, J., concurring, at 1852 (1986).

Therefore, public employers require, at a minimum, parity with private employers in their ability to voluntarily adopt race and sex-based affirmative action plans consistent with the remedial purposes of Title VII.[4]

There is no constitutional impediment to extending the holding of *Weber* to public employers. This Court has approved the use of race-conscious action by public agencies to achieve compliance with the law in appropriate circumstances. *Fullilove v. Klutznick,* 448 U.S. 448 (1980) (minority business set-aside program); *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) (consideration of race as a factor in admission to medical school); *United Jewish Organization of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 165-166 (1977) reapportionment); and *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971) (school desegregation). It has also approved sex-based preferences by public agencies. *Califano v. Webster,* 430 U.S. 313 (1976) (more favorable computation of old-age benefits); *Kahn v. Shevin,* 416 U.S. 351 (1974) (state property tax exemption granted to widows but not to widowers).

This case squarely presents the question of what circumstances will justify sex-conscious action by a public agency in an employment setting.

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4. Because public employers often have strong policy and constitutionally sound reasons for adopting affirmative action plans, we believe they may be entitled to greater latitude to employ such methods.

C. Title VII Permits Sex Based Affirmative Action Plans.

There is no question that the rationale of *Weber* permits sex-based affirmative action plans just as it expressly permitted consideration of race. This Court has already applied the same standards to consideration of claims of sex-based discrimination as to claims of race discrimination. *Dothard v. Rawlinson,* 433 U.S. 321 (1977) (applying *Griggs v. Duke Power Co.,* 401 U.S. 424 (1980), disparate impact theory to sex-based discrimination). Congress itself has noted the similarities between sexual discrimination and racial discrimination. In debates over the 1972 amendments to Title VII the Senate report stated that:

> " . . . discrimination against women is no less serious than other prohibited forms of discrimination, and . . . it to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics. Both categories involve large, natural classes, membership in which is beyond the individual's control; both involve highly visible characteristics on which it has been easy to draw gross, stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races." S. Rep. No. 92-415 at 7-8, 92d Cong., 1st Sess. 7-8 (1971).

The Ninth Circuit addressed the application of *Weber* to sex-based affirmative action in *La Rivere v. Equal Employment Opportunity Commission,* 682 F.2d 1275 (9th Cir 1982):

> ". . . Title VII's gender component . . . was enacted primarily to protect women against discrimination in the market place and to open employment opportunities for women in occupations that had traditionally been closed to them. These purposes mirror those which underlie Title VII's prohibition of racial discrimination. Because the Court in *Weber* identified these purposes as manifesting a congressional intent not to prohibit voluntary affirmative action programs designed to correct racial imbalances in the work force, we must similarly conclude that Congress did not intend, when it added to Title VII the prohibition of gender-based employment discrimination, to prohibit voluntary affirmative action programs designed to correct longstanding sexual imbalances in the work force." (Citations omitted.) 682 F.2d at 1278-1279.

Other circuits have also approved sex-based decisions made pursuant to bona fide affirmative action plans. *Local Union No. 35 of International Brotherhood of Electrical Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *United States v. City of Jackson, Mississippi*, 519 F.2d 1147 (5th Cir. 1975).

II. GROSS UNDERREPRESENTATION OF MINORITY GROUP MEMBERS AND WOMEN IN TRADITIONALLY SEGREGATED JOB CLASSIFICATIONS JUSTIFIES VOLUNTARY AFFIRMATIVE ACTION BY A PUBLIC EMPLOYER.

This Court has recently described the factual predicate for adoption of race-conscious measures pursuant to court order. In *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 106 S.Ct. 3019 (1986), the Court noted the necessity for use of race-conscious measures to remedy longstanding discrimination:

> "In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII." 106 S.Ct. 3036.

Thus it is clear that particularly longstanding or egregious discrimination practiced by a particular employer or union suffices as a justification for race-conscious or sex-conscious remedial measures.

This Court has also indicated its approval of voluntary affirmative action plans adopted by a private employer to correct longstanding discrimination by other parties. The factual predicate for the plan in *Weber* is instructive in the instant case. Until 1974, the Kaiser Aluminum and Chemical Plant in Gramercy, Louisiana hired only persons who had prior craft experience to perform craft work at the plant. Because black workers had long been excluded from craft unions[5] few black applicants possessed the requisite

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5. The Court took judicial notice of the exclusion of black persons from craft unions because of their race. The court cited six federal court opinions and several books and articles in support of its finding. None of them related to discrimination by Kaiser at its Gramercy plant or by the United Steelworkers local which represented employees at the plant. 443 U.S. at 198, n. 1.

experience. Prior to 1974 only 1.83 percent (or five of 273) of the skilled craftworkers at the Gramercy plant were black although the work force in the plant was approximately 39 percent black.

In response to the gross underrepresentation of blacks, Kaiser commenced an in-plant training program for craft workers and reserved 50 percent of the positions for black craft trainees. The Court held that the race-conscious affirmative action plan was lawful under Title VII because it was adopted "to eliminate traditional patterns of racial segregation." 443 U.S. at 201. The Court did not require a judicial finding of discrimination by the company or the union nor did it find that either had discriminated in the past against black applicants for craft worker positions at the Gramercy plant. Instead it found the challenged plan lawful and justified solely by industry-wide discrimination and a statistical comparison between the percentage of black craft workers employed at the plant and the overall black labor pool in the area. According to the Court, private employers could voluntarily adopt "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209.

The Ninth Circuit in the opinion below upheld the Santa Clara County Transportation Agency's voluntary affirmative action plan based on the same type of evidence of prior discrimination as in *Weber*. The court stated: "Like the *Weber* plan, the Agency affirmative action plan is a remedial effort intended to break down entrenched patterns of discrimination." *Johnson v. Transportation Agency, Santa Clara County*, 748 F.2d 1308, *mod.*, 770 F.2d 752, 757 (9th Cir. 1984). At the time of the challenged promo-

tional decision, all of the Agency's 237 skilled craft positions were filled by men and the affirmative action plan noted that women were also underrepresented in other job categories. This, the court concluded, was sufficient to justify voluntary affirmative action:

> "In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force." 770 F.2d at 758 (citation omitted).

Just such a conspicuous imbalance, occurring in a traditionally race segregated job classification, was the justification for the affirmative action plan approved by the Court in *Weber*.

In addition to being segregated on the basis of race, skilled craft jobs have traditionally been and continue to be segregated by sex. The exclusion of women from such jobs is so extensive and so well documented that this Court may take judicial notice of that fact.[6]

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6. In effect, this is just what the Ninth Circuit did. It concluded:

> "Included in the skilled craft category are mechanics, body and fender repairers, construction inspectors, road maintenance workers, and road dispatchers. A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." 770 F.2d at 758.

There have been many judicial findings of exclusion from crafts on the basis of sex. *E.g., Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982); *Local Union No. 35 of International Association of Electrical Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980); *Davis v. Richmond, Fredericksburg & Potomac Railway Co.*, 593 F. Supp. 271 (E.D. Va. 1984); *Bailey v. Southeastern Area Joint Apprenticeship Committee*, 561 F. Supp. 895 (N.D. Va. 1983). See United States Commission on Civil Rights, *A Growing Crisis—Disadvantaged Women and Their Children*, 17-24 (1983).

Nearly every Circuit Court which has reached the question has concluded, as did the Ninth Circuit below, that an employer need not prove that it has engaged in discrimination in employment in order to demonstrate that its voluntary affirmative action plan is consistent with the remedial purposes of Title VII. *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117, *reh. denied*, 105 S.Ct. 1384 (1985); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *mod.*, 712 F.2d 222 (1983); *cert. denied*, 464 U.S. 1040, *reh. denied*, 465 U.S. 1074 (1984); *Warsocki v. City of Omaha*, 726 F.2d 1358 (1984); *Setser v. Novack Investment Company*, 657 F.2d 962 (8th Cir. 1981) (*en banc*), *cert. denied*, 454 U.S. 1064 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1337-1338 (5th Cir. 1980).

The lone exception is the Seventh Circuit's decision in *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), in which the court held that evidence of a statistical disparity between the minority population of the city and the proportion of minorities employed in the police and fire departments did not justify a race-conscious affirmative action plan that created a minority and a non-minority hiring list for the fire department. In requiring evidence that the city itself had discriminated, the holding in *Janowiak* is inconsistent with that of this Court in *Weber*. *Weber* held that past discrimination[7] combined

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7. The discrimination of which the Court took judicial notice was discrimination by skilled craft unions in general and included no evidence of discrimination by the Steelworkers or by Kaiser.

with a present statistical disparity justifies race-conscious affirmative action without the need for proof of prior discrimination by the employer which adopts the affirmative action plan.

In her concurring opinion in *Wygant*, Justice O'Connor points out that requiring a public employer to make a finding that it engaged in discriminatory practices as a predicate to adopting race-conscious affirmative action measures would:

> "... clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.' The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. ... Imposing a contemporaneous findings requirement would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions." 106 S.Ct. at 1855.

Forbidding public employers from voluntarily remedying past discrimination could not have been the intent of Congress when it amended Title VII in 1972 to apply with full force to public employers. The Congressional debates emphasized the pervasiveness of discrimination by public employers and the importance of eliminating such discrimination. Given this Congressional concern it is essential that public employers not be forbidden or even deterred from acting voluntarily to eliminate their own discriminatory practices.

As Justice O'Connor pointed out in *Wygant*, requiring public employers to admit prior discrimination would act as a disincentive to voluntary affirmative action:

> "[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken. Where these employers, who are presumably fully aware of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary. 106 S.Ct. 1855-1856 (concurrence).

Justice O'Connor's remarks recognize that the conflicting responsibilities that a public agency has to its minority constituents and to its non-minority constituents act as a constraint on the actions of such a body in taking affirmative action to end discrimination. A public agency, unlike a private employer, must of necessity balance these competing interests and in doing so not unduly infringe on the rights of either group.

One commentator has suggested that because public employers are politically responsible, courts should grant greater deference to their determinations of a need for affirmative action to redress past discrimination:

> "When, however, a political body institutes a public employment affirmative action program that disadvantages the majority of the persons within the political body's jurisdiction, and when the body is responsible to the public, or when it has received express authority to institute affirmative action from a politically responsible body, courts should give great deference to both the findings of prior discrimination

> and the remedial measures taken, at least when the findings supporting the program are of broad-based societal discrimination. Deference is appropriate for two reasons: First, courts should be wary of second-guessing legislative findings, especially broad-based findings, which legislatures are better suited than courts to make; second, when a political body is responsible to the majority, it seems responsible to presume that when it acts, it protects the interests of the majority." Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies,* 67 Va. L. Rev. 1235 (1981).

Judicial deference in these circumstances would accommodate concerns expressed by the Court that affirmative action not unduly infringe the interests of non-minority workers and that employers be free to undertake affirmative action when it is necessary.

Public bodies such as Amici States and the County of Santa Clara are also politically responsive legislative bodies whose determinations regarding the necessity of affirmative action which may temporarily and incidentally disadvantage the majority of their constituents, should be accorded deference by the courts.

Public agencies must retain the freedom to adopt affirmative action plans in response to compelling governmental needs. For example, affirmative action in employment might be an appropriate means of redressing other types of civil rights violations. In *Bratton v. City of Detroit* the court considered the need to remedy the injury caused to a specific, identifiable segment of the population of Detroit as a direct result of the police department's egregious hiring discrimination. The record in that case established a pattern of mistreatment by

white officers of black citizens of Detroit. According to the court the affirmative action plan which aimed to remedy all the adverse effects of the department's prior practices was justified in part by consideration of the impact of that prior discrimination on the department's ability to supply effective law enforcement services. 704 F.2d at 996-1000.

This Court should act to dispel the confusion regarding the type of findings of discrimination which justifies affirmative action measures by public agencies by applying the *Weber* standard and holding that public employers may make the requisite showing by producing evidence of a present significant underrepresentation of a protected class under Title VII combined with evidence of traditional segregation of the affected job classification or societal discrimination which has contributed to the statistical disparity.

As a practical matter an employer can make the requisite showing based primarily on statistical evidence sufficient to establish a prima facie case of unlawful discrimination under Title VII. Under both the disparate impact and the disparate treatment theories under Title VII a plaintiff may establish a prima facie case of discrimination based solely on statistical evidence of racial or sexual imbalance. As the Court noted in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the

> population in the community from which employees are hired. 431 U.S. at 340, n. 20.

Teamsters involved a claim of disparate treatment, but this Court has also held that a statistical disparity suffices to establish a prima facie case under a disparate impact theory, stating that "[w]here gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States,* 433 U.S. 299, 307-308 (1977).

Several lower courts have explicity drawn an analogy between the use of statistics by plaintiffs to prove a prima facie case of discrimination and the use by employers of statistical disparities to justify remedial affirmative action. The court in *Tangren v. Wackenhut Services,* 480 F.Supp. 539 (D. Nev. 1979), *aff'd* 658 F.2d 705 (9th Cir. 1981), *cert. denied,* 456 U.S. 916 (1982) noted that courts have consistently held that statistical evidence is sufficient to establish a prima facie case of unlawful discrimination and concluded that "[i]f such a showing is sufficient to permit the imposition of legal sanctions, a fortiori, the same showing should permit an employer and union to adopt a voluntary affirmative action program." 480 F.Supp. at 547; *accord, Bushey v. New York State Civil Service Commission,* 733 F.2d at 228. Similarly, the Ninth Circuit opinion below observed that the statistical evidence was sufficient to establish a prima facie case of discrimination. 770 F.2d at 758, n. 5. Indeed the evidence of female representation among 238 skilled craft positions in the Santa Clara County Transportation Agency stood at the "inexorable zero." *See Teamsters v. United States,* 431 U.S. at 342, n. 23. By

any standard this evidence standing alone would have established a prima facie case and thereby justified the program.

Because of the gross underrepresentation of women in its skilled craft jobs, the Agency was particularly vulnerable to lawsuits claiming sex discrimination. Courts have consistently held that evidence of gross statistical disparities between the percentage of minority or female workers and the percentage of minorities or females in the population is sufficient to establish a prima facie case of disparate treatment on the basis of race or sex. *E.g., Dothard v. Rawlinson,* 433 U.S. 321 (12.9 percent female work force compared to 52.75 percent females in population); *United States v. City of Alexandria,* 614 F.2d at 1364 (5th Cir. 1980); *Kaplan v. I.A.T.S.E., Local 659,* 525 F.2d 1354, 1358, n. 1 (9th Cir. 1975) (no female photographers); *Jones v. Lee Way Motor Freight, Inc.,* 431 F.2d 245, 247 (10th Cir. 1970) (no black line drivers); *Kilgo v. Bowman Transportation, Inc.,* 570 F.Supp. 1509 (N.D. Ga. 1983).

III. THE AGENCY AFFIRMATIVE ACTION PLAN IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE.

This Court in *Weber* declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. It did, however, provide some guidance by holding that the Kaiser plan was a permissible one and outlining the factors compelling that conclusion. The Court concluded that the Kaiser plan fell on the permissible side of the line because: (1) it was designed to open employment opportunities in an occupation traditionally closed to black workers; (2)

it did not "unnecessarily trammel" the interests of white workers or create an absolute bar to their advancement; and (3) it was a temporary measure intended to eliminate a racial imbalance, but not to maintain racial balance. 443 U.S. at 208. The court below applied these criteria to the Agency's plan and correctly determined that by this measure the Agency's plan also fell on the permissible side of the line.

First of all, the plan was adopted to eliminate a manifest sexual imbalance in a job classification traditionally segregated by sex. Many courts have recognized that women have been almost wholly excluded from skilled craft positions and from apprenticeship programs leading to employment in such jobs. *E.g., Thompson v. Sawyer,* 678 F.2d 257; *Local Union No. 35 of International Association of Electrical Workers v. City of Hartford,* 625 F.2d 416; *Davis v. Richmond, Fredericksburg & Potomac Railway Co.,* 593 F.Supp. 271. The evidence regarding the Agency's hiring for such positions is consistent with this general history of exclusion of females from such jobs—at the time of the challenged promotional decision all 238 skilled craft jobs in the Agency were filled by men and no woman had ever held such a job.

Correction of the traditional exclusion of women from skilled craft positions was not the sole purpose of the Transportation Agency's affirmative action plan. The plan also applied to other traditionally disadvantaged groups and to other job classifications, some of which were not traditionally segregated. However, petitioners herein do not challenge the affirmative plan in toto—they merely argue that it did not serve to insulate this particular em-

ployment decision from liability under Title VII. Thus their arguments regarding the features of the plan that related to other job classifications are simply not necessary or even relevant to the disposition of this case.[8] The Transportation Agency considered Diane Joyce's sex as a factor in determining that she should be promoted in part to remedy the longstanding pattern of exclusion of women from skilled craft jobs. Had it failed to do so it would have perpetuated the historically segregated character of the job even though James Graebner, the appointing official, viewed Mr. Johnson and Ms. Joyce as "essentially equal in qualifications." Pet. App. 3A. Thus in this respect, this employment decision based on this affirmative action plan is fully consistent with the Court's decision in *Weber*.

The next factor considered by the Court in *Weber* was the effect of the challenged affirmative action plan on the interests of white employees who might be disadvantaged by its operation. Of course the effect of the plan on Paul Johnson was to deny him a promotion that he perhaps would have received had the affirmative action plan not been in effect. The effect on Brian Weber was equally direct; he was denied entry into a training program while black employees with less seniority than he were admitted. This Court necessarily weighed the harm to innocent white employees like Brian Weber against the necessity for undoing the legacy of many years of racial (and sexual) segregation in the job market. And on balance the Court

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8. Indeed the record in this case is silent as to what action the Agency took to meet its hiring and promotional goals for other job classifications.

considered not merely the effect on Brian Weber, the individual, but the effect on white applicants as a group. The Court stated: "[t]he plan does not require the discharge of white workers and their replacement with new black hirees . . . [n]or does the plan create an absolute bar to the advancement of white employees." 443 U.S. at 208. This language applies equally to the Transportation Agency's plan.

In fact, the impact on male employees in the instant case is less intrusive than that of the plan approved in *Weber*. The ordinary application of the *Weber* plan called for allocation of 50 percent of the trainee positions to black persons and 50 percent to white persons. On the contrary, the Agency plan as it relates to this promotional decision contained a *goal* of achieving 36.5 percent women employed in skilled craft positions. Obviously no particular implementation ratio was used because the appointing official was free to appoint a male even though males had received all prior appointments. All the plan requires is that the appointing official *consciously consider* qualified female applicants, and, as in this case where women had been wholly excluded, sex might be the determinative factor in making the decision. The plan did not require that a fixed percentage of women be promoted and it permitted, and indeed, required, consideration of relative qualifications.

Therefore, this plan does not contain the features which led this Court to disapprove the affirmative action plan in the *Wygant* case. The Court in that case expressed its concern with the severe burden of non-minority workers of a plan which caused loss of an existing job:

"[i]n cases involving *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." 106 S.Ct. at 1851. Promotional goals are even less intrusive than hiring goals because the unsuccessful applicant for promotion remains employed and may compete for other promotional opportunities.

Finally, the plan was intended not to maintain but to achieve racial and sexual balance and thus would end when its goals were achieved. Therefore, the Ninth Circuit concluded that it was a temporary plan.

The Court in *Weber* did not intend to prescribe general standards for determining the validity under Title VII of all voluntary affirmative action plans; it merely indicated those features of the Kaiser plan that caused it to fall on the permissible side of the line. Lower courts have attempted to formulate general standards for determining the validity of voluntary affirmative action efforts including those by public employers. Several of these courts have developed a constitutional standard. In *Valentine v. Smith,* 654 F.2d 503 (8th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981), a case challenging a race-conscious affirmative action plan initiated by Arkansas State University, the court articulated its standard as follows:

> "The test for determining whether Arkansas has adopted constitutionally permissible means is whether the affirmative action plan is 'substantially related' to the objective of remedying prior discrimination. A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority

> applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from all vacancies or otherwise unnecessarily or invidiously trammel their interests." 654 F.2d at 510.

This test has the advantage of taking into account all of the considerations mentioned by the Court in *Weber* as well as an additional factor—that applicants to be hired or promoted be qualified for the position in question—not relevant to the Court in *Weber* because the plan at issue was a training program whose only qualification was being a current employee of the company.

In some circumstances an employer might be justified in adopting a short-term goal higher than the proportion of minority persons in the relevant population. *Bratton v. City of Detroit*, 704 F.2d 878.

This test also permits a weighing of the competing goals of remedying manifest racial and sexual imbalances with the interests of male and non-minority employees. By requiring that a plan's goal be achievement of approximately the hiring ratios that would have obtained absent past discrimination this test assures that the plan's focus truly is on remedying the effects of past discrimination and not merely the achievement of an ideal racial and sexual balance. Adoption of such modest goals will also minimize the impact of the plan on male and non-minority

employees by limiting its duration and by reducing the number of hiring decisions that will include race or sex as a factor.

To illustrate the practical use of this test, the court in *Valentine v. Smith* determined that Arkansas State University set a goal of raising the percentage of black faculty to a total of five percent between 1976 and 1979; to accomplish this goal required that 25 percent of the new faculty hired be black. The court concluded that the goals of the challenged plan were substantially related to the university's objective of remedying past discrimination.

Judged by the *Valentine v. Smith* test, the promotional decision is valid under the Constitution and under Title VII. As argued above, the plan was adopted to correct a significant underrepresentation of females in skilled craft jobs, among others. Its implementation was intended to achieve parity between the proportion of women throughout the County's labor force and the proportion of women employed by the County in various job classifications. This is generally the result to be expected absent discrimination. *Teamsters v. United States*, 431 U.S. at 340, n. 20. However, even assuming for the sake of argument that the 36.5 percent goal for participation of women was too high, the particular sex-conscious promotional decision at issue here is still valid. Prior to promoting Diane Joyce, the percentage of women in skilled craft positions was zero, after she was promoted the percentage increased only 0.4 percent, still substantially lower than the percentage to be expected absent discrimination.

The plan of its own terms would endure only so long as necessary to achieve its goals and the record indicates that a new plan was adopted in 1982 containing different goals. The plan did not result in hiring unqualified applicants; there is no question that Joyce was qualifed for the position to which she was promoted. There is no evidence in the record that the plan completely barred male or white employees or otherwise unnecessarily infringed their interests. The plan did not contain a fixed quota nor does the record indicate the number of males who were affected by it.

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CONCLUSION

As de Tocqueville stated in reference to slavery, "[a] natural prejudice leads a man to scorn anybody who has been his inferior, long after he has become his equal; the real inequality . . . is always followed by an imaginary inequality rooted in mores."[9] Until that imaginary inequality of women and blacks in the job market passes from the minds of decision makers, employers must have the freedom to take affirmative action required to counteract it. Thus in the short term, sex and race-conscious hiring and promotional goals narrowly tailored to remedy past dis-

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9. de Tocqueville, *Democracy in America* 341 (Mayer ed. 1969).

criminatory are necessary and are lawful under Title VII and the Constitution.

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